

# A Guide to **MONTANA WATER QUALITY REGULATION**

produced by

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and  
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*Third Printing*  
May 29, 1998

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Department of  
Environmental Quality  
Water Quality Division

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a joint publication of:

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# DEDICATION

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**In memory of Robert J. Thompson . . .**

for his immeasurable effort and commitment to  
Montana's water resources.



# FOREWORD

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This "***Guide to Montana Water Quality Regulation***" has its origins in a telephone call from a Great Falls, Montana student, who explained, "I'm writing a report on Montana's water quality laws. ***Do you have any helpful information for me?***"

After much deliberation and consultation, the answer was a resounding and unfortunate "No." The best we could do was send her a bundled, incomprehensible morass of water quality laws and regulations.

That telephone request characterizes the countless inquiries we continually receive from citizens and businesses seeking understandable water quality information. Naturally, we welcomed the challenge of compiling a comprehensive, single-source digest of Montana's basic legal structure governing this complex arena. Although it is a little late for our Great Falls student, we hope this manual fits the bill.

Our joint goal is to encourage thoughtful citizen involvement, ensuring that participation evolves with maximum education. It is therefore with pleasure that we advance this small document -- a ***must have*** personal manual -- as a starting point for all Montanans, from student to policymaker, to more effectively involve themselves in Montana's water quality.

Let us now proceed with conversation and action, always with the reminder that information is our best friend and ultimate conciliator.

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*A primer for the citizen, this manual addresses commonly asked policy questions regarding water quality. Explanations attempt to relay principles in understandable terms. In the simplification process, some technical nuances may be lost. For the legally curious, we recommend direct reference to cited laws and state agencies.*

# MONTANA’S WATER

Whether fishing in hip-deep mountain streams, diverting lowland creeks over alfalfa crops, or simply drinking a glass of water, each Montanan holds a unique view of **water quality**. Consensus emerges, nonetheless, in the belief that Montana’s waters are integral to our economic and environmental well being. To protect our state waters -- for the present **and the future** -- a framework of water quality laws exists.

## WHICH “WATERS” ARE “STATE WATERS”?

The **Montana Constitution** defines state waters as:

*[a]ll surface, underground, flood, and atmospheric waters within the boundaries of the state . . . (Article IX, Section 3(3)).*

Apparently, “water” in Montana means every drop, wherever it occurs.

## WHICH STATE WATERS ARE REGULATED?

Although Montana’s definition of “water” is all-encompassing, water quality laws govern **only certain** state waters. Specifically regulated are **surface or underground**:

- bodies of water,
- irrigation systems, or
- drainage systems (**MCA** § 75-5-103(25)(a)).

Outside this regulatory realm are:

- ponds or lagoons used solely for treating, transporting, or impounding pollutants; or

- irrigation or land application disposal waters used up and not returned to state waters (MCA § 75-5-103(25)(b)).

## WHY IS MONTANA WATER QUALITY IMPORTANT?

From our households, to our workplaces, to our favorite recreational spots, Montanans depend on water. Yet, not just the **presence** of water is critical, but the **quality** of the water as well.

The **Montana Constitutional Bill of Rights** recognizes the significant role environmental quality plays in our human activities:

*[a]ll persons . . . have certain inalienable rights . . . includ[ing] the right to a clean and healthful environment and the rights of pursuing life's basic necessities . . . In enjoying these rights, all persons recognize corresponding responsibilities (Article II, Section 3) (emphasis added).*

In other words, just as each person holds the fundamental **right to seek a livelihood**, each person also possesses a **right and responsibility** to safeguard state waters from **degradation**.

This balance between human activity and water quality resurfaces in the Montana **statutes**, where public policy strives to:

- conserve water by protecting, maintaining, and improving the quality . . . of water for public water supplies, wildlife, fish and aquatic life, agriculture, industry, recreation, and other beneficial uses; [and]
- provide a comprehensive program for the prevention, abatement, and control of water pollution (MCA § 75-5-101(1)-(2)) (emphasis added).

Thus, the state promotes water quality -- while also accommodating human uses -- through laws that guide our water-related activities.

# REGULATION

## WHO IS REGULATED?

Montana water quality laws regulate every entity in the state, including: individuals, businesses, organizations, and units of government.

## WHAT WATER USES ARE REGULATED?

It is difficult to imagine a use of water that does not alter that water somehow. Whether utilized in industrial processes, irrigation, or even in the home, water undergoes change. Chemicals may be added or removed, or the temperature, color, or **turbidity** may vary. Although **every** water use causes an alteration, water quality laws regulate **only certain** uses.

Regulated uses are those entailing potential **pollution** (either **point source** or **nonpoint source**) to state waters: that is, activities that threaten water quality, human or wildlife health, or established **beneficial uses** (MCA § 75-5-103(2), (20)-(21) and 80-15-102(11)).

## WHERE DO MONTANA'S WATER QUALITY LAWS ORIGINATE?

### Clean Water Act -- National

Today's Montana water quality protection descends from the national level under the federal **Clean Water Act** (CWA), created in 1972 (33 U.S.C. 1251 et seq.). The CWA regulates the discharge of pollutants into waters by establishing national standards and **permit** guidelines. The federal Environmental Protection Agency (EPA) oversees the act's implementation.

In 1974, the EPA delegated Montana the authority to implement many CWA programs within the state (Cooperative Enforcement Agreement Between U.S. EPA and DEQ). Through agencies and laws, Montana executes federal water quality guidelines, updating its delegated programs to reflect changes at the federal level.

## Montana Constitution -- State

Another point of origin is the **Montana Constitution**, which complements federal mandates with state environmental quality priorities:

*[t]he state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations* (Article IX, Section 1(1)) (emphasis added).

These national and state agendas merge in Montana's primary source of water quality law: the **Montana Water Quality Act** (WQA) (MCA § 75-5-101 et seq.).

# WATER QUALITY ACT

The Montana Legislature passed its first water quality law in 1907, responding to **typhoid** outbreaks in the Milk River basin. The law required treatment of all sewage discharged into public water supplies. This legislation became the first in a series leading to our current water quality statutes, collectively known as the **Montana Water Quality Act (WQA)**.

The WQA incorporates **both national and state** policy by integrating the directives of the federal **Clean Water Act (CWA)** while also codifying the priorities of the **Montana Constitution's** environmental quality clauses.

Essentially, the WQA provides guidelines to prevent, **abate**, and control the pollution of Montana waters in a manner consistent with national standards (MCA § 75-5-102(1)).

## WHO ADMINISTERS THE WATER QUALITY ACT?

### Environmental Protection Agency -- National

When the Environmental Protection Agency (EPA) delegated Montana authority to implement certain CWA programs, the federal agency's role shifted from direct administration to support and **oversight**. However, the EPA retains ultimate authority to administer aspects of the CWA on a case-by-case basis, if needed.

### Department of Environmental Quality -- State

The Department of Environmental Quality (DEQ) is the state agency primarily responsible for implementing the WQA. The governor appoints its director (MCA § 2-15-3501). In administering water quality laws, the DEQ:

- collects and furnishes information relating to pollution prevention/control;
- conducts and encourages research relating to pollution prevention/control;
- advises, consults, and cooperates with other states, other state and federal agencies, affected groups, political subdivisions, and industries in formulating pollution prevention/control plans; and
- monitors, inspects, and otherwise enforces water quality laws (MCA § 75-5-212-213 and 75-7-602-603).

## Board of Environmental Review -- State

The Board of Environmental Review is a quasi-judicial, seven-member body appointed by the governor to provide policy guidance to the DEQ. Members represent the geographic areas of the state, with backgrounds in hydrology, local government planning, environmental sciences, and county health or medicine (MCA § 2-15-3502(1)-(5)).

The Board adopts administrative rules, holds hearings, delegates functions, and may set up a system for the assessment of penalties for water quality violations (MCA § 75-5-201 et seq.).

### HOW IS THE WATER QUALITY ACT ADMINISTERED?

To enable DEQ implementation of water quality laws, the Board advances administrative rules and policies, including:

- classification of state waters,
- water quality standards, and
- the Nondegradation Policy.

### ●● CLASSIFICATION OF WATERS ●●

The Board classifies all state surface water and ground water according to the beneficial uses supported by each water body/segment (MCA § 75-5-301(1)).

#### Surface Water

Surface water classification uses four basic categories: **A**, **B**, **C**, and **I** -- based primarily on beneficial use (**ARM** 17.30.621-629). Montana has classified all its surface water, and the DEQ is currently tabulating the miles of water/class.

CLASS	QUALITY	BENEFICIAL USE
<b>A</b>	very high quality	• beneficial use: primarily <u>domestic use</u>
<b>B</b>	high quality	• comprise the majority of surface waters in Montana • beneficial use: domestic use, agricultural and industrial water supply, and associated aquatic life and wildlife uses
<b>C</b>	low quality	• appear commonly in eastern Montana • beneficial use: same as class "B," except unsuitable for drinking
<b>I</b>	<u>impacted</u>	• appear in limited numbers in Montana • beneficial use: generally unsuitable for any purpose



## Ground Water

Ground water classification involves four classes: I, II, III, and IV -- based on (1) beneficial use and (2) **specific conductance** (ARM 17.30.621-629). Unlike surface water, ground water classifications are incomplete due to resource constraints and the complexity of the ground water resource.

CLASS	QUALITY	BENEFICIAL USE	SPECIFIC CONDUCTANCE (micromhos/cm at 25° C)
I	good quality	• beneficial use: drinking water and other domestic uses	less than 1,000
II	fair quality	• beneficial use: marginally suitable for drinking water and other domestic uses	1,000-2,500
III	poor quality	• beneficial use: <b>brackish</b> and unsuitable for domestic uses; marginal or unsuited for irrigation; possible industrial or commercial uses	2,500-15,000
IV	very poor quality	• beneficial use: brackish and generally unsuitable for any purpose	greater than 15,000

The Board is obligated to review classifications at least every three years, if needed (MCA § 75-5-301(3)). Water classifications ***cannot be lowered*** unless the Board finds an original misclassification occurred (MCA § 75-5-302).

### ●● WATER QUALITY STANDARDS ●●

The Board formulates and adopts water quality standards, specifying maximum allowable levels of alteration during use of state waters.

Water quality standards are both numeric and narrative. For example, the state nitrate standard equals ten **parts per million** (ppm) (DEQ Circular WQB-7); whereas, for certain "A" class waters, the following standard applies:

*[n]o increases are allowed above naturally occurring concentrations of sediment, settleable solids, oils, or floating solids, which will or are likely to create a nuisance or render the waters harmful, detrimental, or injurious . . . (ARM 17.30.622(3)(f)).*

Although dissimilar, both numeric and narrative standards are valid and enforceable. The Board reviews standards at least every three years, if needed (MCA § 75-5-301(3)).

WATER TYPE	PROTECTION LEVEL	ALLOWABLE DEGRADATION	APPLICATION TO DEGRADE/ NONDEGRADATION REVIEW
Outstanding Resource	highest	• allowable degradation = none (except nonsignificant activities)	required
High Quality	second	• allowable degradation = up to but not exceeding water quality standards	required
Other	lowest	• allowable degradation = up to but not exceeding water quality standards	not required, but water quality and permit laws still apply

### Exceptions to the Rule

**Nonsignificant Activities.** The Board establishes criteria for determining if a proposed activity will result in nonsignificant changes to water quality. Once an activity is designated "nonsignificant," it is exempted from: (1) nondegradation review, (2) permit requirements, and (3) all ORW restrictions.

The criteria cover:

- the potential for harm to human health or the environment;
- both the quantity and the strength of the pollutant;
- the length of time the degradation will occur; and
- the character of the pollutant -- placing greater significance on carcinogens and toxins that **bioaccumulate** and lesser significance on less harmful, less persistent substances (MCA § 75-5-301(5)(c)(i)-(iv)).

Beyond the above general criteria, the WQA identifies specific activities as nonsignificant, including:

- forms of nonpoint source pollution,
- emergency remedial activity,
- recreational activities,
- dam maintenance, and
- mineral exploration (MCA § 75-5-317(2)(a)-(s)).



**Authorizations to Degrade.** The DEQ, in accordance with Board rules and statutes, may authorize degradation if a discharger demonstrates by a preponderance of evidence that:

- there are no economically, environmentally, and technologically feasible modifications to the proposed project that would result in no degradation;
- the proposed project will result in important economic or social benefits that exceed societal costs of allowing degradation;
- existing and anticipated uses of state waters will be fully protected; and
- the least degrading water quality protection practices will be used (MCA § 75-5-303(3)(a)-(d)).

The DEQ issues a **preliminary decision** either denying or authorizing degradation, providing public notice and a thirty-day comment period before issuing a **final decision**. The Department's preliminary and final decisions must contain: (1) a statement of the basis for the decision, and (2) a detailed description of all authorization conditions, stipulating:

- monitoring/reporting requirements,
- required water protection practices,
- **effluent** limits, and
- designation of mixing zones (MCA § 75-5-303(4)(a)-(b)).

Only **interested persons** can appeal a nondegradation decision. The DEQ may review and revise -- but not revoke -- authorizations to degrade once every five years.

## HOW IS THE WATER QUALITY ACT ADMINISTERED ON TRIBAL LANDS?

### National

In 1993, new language in the CWA began allowing Indian tribes to adopt their own water quality standards (Section 518). Under this provision, the EPA recognizes the tribe as a state, with **both tribal and non-Indian people** subject to tribal standards within reservation boundaries. Through litigation, many states are challenging the legality of this EPA effort.

## State

Presently, the applicability of Montana water quality laws on tribal reservations is unclear. While the state ***does not*** enforce its water quality statutes on ***tribal members*** on tribal lands, the state maintains that it ***can*** enforce the statutes on ***non-Indians*** on tribal lands. Certain tribal governments disagree. This issue may require adjudication to be resolved.

Ultimately, implementation of the WQA is a blend of federal, state, and tribal cooperation that varies, depending on: the water use, type of water source, and region of the state.

# THE PERMIT PROCESS

Anyone proposing to discharge sewage, industrial waste, or other pollutants into regulated state waters (i.e., surface, ground, or storm waters) must apply for a discharge permit. The three main permits issued pursuant to the **Water Quality Act** (WQA) are:

- **Pollutant Discharge Elimination System** (MPDES) permit -- for surface water discharge,
- ground water discharge permit, and
- storm water discharge permit (ARM 17.30.1001 et seq., 1201 et seq., and 1332).

## WHO IS IN CHARGE OF THE PERMIT PROCESS?

### Board of Environmental Review

The Board of Environmental Review adopts rules governing the application process for all three permits. These rules direct how the Department of Environmental Quality (DEQ) issues, denies, revises, or revokes a permit.

### Department of Environmental Quality

The DEQ -- according to Board guidelines -- processes permit applications, dictates permit conditions and limitations, and reviews permit renewals.

## HOW DOES THE PERMIT PROCESS WORK?

Dischargers must submit permit applications **at least** 180 days before commencement of discharge. Specific application requirements vary, depending on: (1) the entity applying, (2) the type/characteristics of the discharge, and (3) the receiving waters. However, typically required information may comprise:

- date of expected discharge commencement;
- description of the proposed discharge (e.g., frequency/duration of flow and quantitative pollutant data);
- location of the discharge, affected drainage areas, and receiving waters; and/or
- disclosure of any treatments applied to the discharge (ARM 17.30.1322).

## Permit Exemptions

In addition to nonsignificant activities (mentioned above), certain discharges to ground water are also exempt from permit requirements. These relate to:

- oil and gas exploration/production,
- **solid waste** disposal,
- agricultural irrigation,
- disposal of normal household wastes on private property,
- storm water disposal,
- subsurface disposal systems for **sanitary** wastes, and
- mining operations subject to operating permits/exploration licenses (MCA § 75-5-401(5)(a)-(k)).

Although such discharges are exempt from the permit process, the DEQ may still require monitoring information (MCA § 75-5-602).

## Time Line and Review

A water quality permit cannot exceed five years, after which time the permit holder must reapply (ARM 17.30.1346). This reapplication requirement also functions as a form of permit review.

## Permit Suspension or Revocation

The DEQ may suspend/revoke a permit if the permit holder violates the WQA. The suspension/revocation may be **effective immediately** if the violation is likely to continue, causing harmful pollution (MCA § 75-5-404).

If the permit holder **petitions** against a DEQ suspension/revocation, the Board will: (1) grant a hearing and (2) issue a decision affirming, modifying, or reversing Department action.

## WHAT ROLE DOES THE NONDEGRADATION POLICY PLAY IN THE PERMIT PROCESS?

A strong relationship exists between the permit process and the **Nondegradation Policy**. In considering a permit application, the DEQ must:

- (1) determine (a) the classification of the receiving water and

- (b) if the receiving water is high quality for the purposes of nondegradation review;
- (3) develop a database on the quality and quantity of the receiving water;
- (4) determine whether "natural" conditions in the receiving water result in exceedance of standards;
- (5) determine the significance of the discharge; and
- (6) if parameters in the discharge will be significant, prepare an application to degrade under the Nondegradation Policy (MCA § 75-5-301, 303, and 306 and ARM 17.30.7).

# ENFORCEMENT AND COMPLIANCE

## WHO ENFORCES WATER QUALITY LAWS?

### Environmental Protection Agency -- National

In its support and oversight role, the Environmental Protection Agency (EPA) oversees state enforcement, encouraging the development of regulatory policies patterned after federal ones. Thus, the state is the primary enforcer of water quality law, supplemented by federal agency guidance.

However, an EPA *intervention* in state enforcement may be triggered by any of the following:

- the violation involves federal or interstate issues,
- Montana requests that the EPA participate in a joint action,
- Montana refers the case to the EPA,
- the EPA determines that the case is nationally significant, and/or
- the EPA determines that Montana did not enforce in a timely and appropriate manner (Cooperative Enforcement Agreement Between U.S. EPA and DEQ).

### Department of Environmental Quality -- State

The Department of Environmental Quality (DEQ) responds to ***suspected or determined*** water quality violations, monitoring and inspecting discharges to ensure **compliance** with permits and laws.

**Monitoring Power.** To effectively monitor discharges, the DEQ can require the discharger to:

- maintain records,
- make reports,
- employ monitoring equipment,
- sample effluents, or
- provide other relevant information (MCA § 75-5-602(1)-(5)).

**Inspection Power.** The Department, at reasonable times, can enter any public or private property to:

- investigate conditions relating to pollution of state waters or permit violations,



- access and copy relevant records,
- inspect monitoring equipment, or
- sample effluents (MCA § 75-5-603(1)-(4)).

## Board of Environmental Review -- State

The Board of Environmental Review establishes the procedures that DEQ follows in its enforcement actions. Additionally, the Board presides over enforcement hearings, handing down decisions.

### WHO IS A VIOLATOR?

A violator is anyone who causes pollution of any state water. Legally permitted or exempted discharges do not constitute pollution under the **Water Quality Act (WQA)** (MCA § 75-5-605(1)(a)).

### WHAT ACTIVITIES ARE PROHIBITED?

It is unlawful for any person to:

- place wastes or pollution where they will cause pollution to state waters,
- violate any provision of the WQA,
- violate any provision of a permit or order issued under the WQA,
- cause degradation of state waters without authorization, or
- construct a sewage lagoon less than 500 feet from an existing water well (MCA § 75-5-605(1)).

### WHAT HAPPENS WHEN A VIOLATION IS *SUSPECTED*?

Any person, association, corporation, or government agency may notify the DEQ of an alleged violation. When the Department ***suspects*** that a person violated water quality law, it conducts an investigation and initiates informal enforcement.

### ●● INFORMAL ACTION ●●

Depending on the nature of the alleged violation, the DEQ may attempt to bring a suspected violator into compliance through informal action. This may involve: phone

calls, on-site visits, technical assistance, or notification by mail. If these efforts fail to resolve the situation -- or if the violation is determined to be severe -- the Department will launch formal enforcement actions.

## WHAT HAPPENS WHEN A VIOLATION IS *DETERMINED*?

When the DEQ **determines** a person violated water quality law -- and an informal response is either unsuccessful or unsuitable to the nature of the violation -- the Department initiates a formal enforcement response, consisting of: (1) an administrative action and/or (2) a judicial action.

### ●● ADMINISTRATIVE ACTION ●●

Administrative actions are the lowest level of formal enforcement, consisting of:

- notices of violation,
- compliance orders, and
- public hearings.

#### Notice of Violation

Unless a violation is an immediate threat to human health/safety or the welfare of the environment, the DEQ will first issue a notice of violation to the violator, specifying:

- the provision of statute, rule, or permit violated; and
- the facts constituting the violation (MCA § 75-5-611(1) and 617(2)).

#### Compliance Orders

In conjunction with the violation notice, the DEQ may serve the violator a compliance order, stipulating:

- the specific nature of corrective action required,
- a timetable for reaching compliance, and
- the administrative penalty assessed if corrective action is incomplete within the time provided (MCA § 75-5-611(1)(c)-(e)).

In establishing the compliance timetable, the Department considers the seriousness of the violation and any good faith efforts made to abate or control pollution (MCA § 75-5-613).



**Cleanup Orders.** The DEQ may order cleanup when a person dumps, spills, or otherwise deposits waste in or near state waters, creating potential pollution (MCA § 75-5-601(1)).

**Emergency Orders.** If the DEQ finds that substantial human or environmental injury will result from a violation, the Department may order the action stopped *immediately* (MCA § 75-5-621(1)).

**Public Hearings**

Alongside a notice/order, the DEQ may require the violator to appear at a Board hearing to answer charges. Hearings are public and usually held in Helena, the state capitol. After a hearing, the Board delivers a finding and explanation of its decision (MCA § 75-5-611(3)-(6)(a)).

**Board Orders.** If the Board finds that a violation *occurred*, it:

- issues an order for the **abatement**/control of pollution, and/or
- requests the DEQ to assess administrative penalties (MCA § 75-5-611(6)(b)-(c)).

If, on the other hand, the Board finds that a violation *has not occurred*, it declares the DEQ notice/order “void,” and the alleged violator faces no penalty (MCA § 75-5-611(6)(e)).

**●● JUDICIAL ACTION ●●**

Upon receipt of evidence that substantial, harmful pollution has occurred, the DEQ may sue in a district court of the county where the violator resides or conducts business (MCA § 75-5-622).

**Injunctions**

Once the court finds reasonable cause to believe DEQ allegations, it may issue a permanent or temporary **injunction** restraining the violation and requiring compliance.

**Penalties**

Besides an injunction, a person found guilty may also be subject to monetary penalties and/or imprisonment.

**Civil Penalties.** Civil penalties do not include potential imprisonment. The violator is subject to a fine of up to \$25,000/day. Each day of violation constitutes a separate violation. In assessing the penalty, the court considers:

- the nature and gravity of the violation,
- the violator's ability to pay,
- prior history of violations, and
- amounts voluntarily spent by the violator to **mitigate** the violation (MCA § 75-5-631(1) and (4)(a)-(b)).

**Criminal Penalties.** When a violation is willful or negligent, the court may impose criminal penalties, including imprisonment. Upon conviction, the violator is subject to a fine of up to \$25,000/day of violation, imprisonment for up to one year, or both (MCA § 75-5-632).

**Administrative Penalties.** The DEQ can request the court to assess a violator for: (1) the cost of the investigation and (2) any other expense incurred by the state in correcting the adverse water quality effects resulting from the violation (MCA § 75-5-635(1)).

TYPE OF ACTION	ENFORCEMENT LEVEL	POTENTIAL COMPLIANCE MEASURES
Informal	lowest of all levels	• phone calls, on-site visits, technical assistance, or notification by mail
Administrative	lowest formal level	• notice of violation, compliance orders, and public hearings
Judicial	highest of all levels	• injunctions, monetary penalties, and imprisonment

**CAN ENFORCEMENT DECISIONS BE CHALLENGED?**

**Notices/Orders**

If the DEQ **does not** call a hearing when issuing a notice/order, the violator may request the Board to do so. The request must be in writing and filed **no later than** thirty days after receipt of the notice/order. Additionally, the violator may petition the Board for a rehearing based on new evidence (MCA § 75-5-611(4) and (7)).

## Board Orders

A violator may appeal a Board order in the district court of the county where the violation occurred. The court may **overturn** an order if:

- the order will cause serious harm to the affected part,
- violations found by the Board will not continue, or
- any harmful effects on state waters will be remedied immediately when the violation stops (MCA § 75-5-641(1) and (4)(a)-(b)).

However, if the court **upholds** the order, it can -- at the request of the Board -- enforce compliance by issuing an injunction.

## Court Injunctions/Penalties

An **appeal** of a district court injunction/penalty follows the traditional path through the court system, with a superior court reviewing the decision of the district court, either: (1) affirming the decision, (2) reversing the decision, or (3) **remanding** the decision back to the district court with suggestion for further action.

# PUBLIC AND COMMUNITY INVOLVEMENT

## HOW CAN CITIZENS PARTICIPATE IN WATER QUALITY PROTECTION?

Citizens play a vital role in the success of sustaining Montana's water quality. Commonly, we influence policy through our election of and interaction with public officials. Alternatively, we can contribute via:

- petitions,
- public hearings/notices,
- legal suits, and
- citizen oversight.

### ●● PETITIONS ●●

Certain water quality statutes allow citizens to petition the Board for action on a matter. Petitions, which may lead to a public hearing, relate to:

- administrative rulemaking,
- temporary standards,
- water classifications, and
- permitting.

### Administrative Rulemaking

A person affected by a Board rule may petition for review of the rule if:

- the rule may be more stringent than comparable federal regulations; or
- during adoption of the rule, no comparable federal regulation existed, but the federal government has subsequently established a comparable, less stringent rule.

Affected persons must note that a petition **does not** relieve the petitioner of the duty to comply with the challenged rule (MCA § 75-5-203(4)).

## Temporary Standards

Upon petition by any person, the Board may temporarily modify a water quality standard for a specific water body/segment on a parameter-by-parameter basis. Modification can occur only when substantive information shows that the body/segment is not supporting its designated use (MCA § 75-5-312(1)-(10)).

## Classifications

Any person may petition the Board to classify state waters as outstanding resource waters (ORW). In considering the petition, the Board examines:

- whether the waters have been designated as wild and scenic;
- the presence of endangered or threatened species in the waters;
- the presence of an outstanding recreational fishery in the waters;
- and
- whether the waters provide the only source of suitable water for municipal, industrial, or domestic water supply.

After gaining Board acceptance: (1) an **Environmental Impact Statement** (EIS) must be prepared and (2) the petition must earn legislative approval (MCA § 75-5-316(3)-(8)).

## Permitting

If the DEQ denies, modifies, suspends, or revokes a permit, the applicant or permittee may petition the Board. This leads to a hearing where the Board: affirms, revises, or reverses the DEQ action (MCA § 75-5-403(2)-404).

## ●● PUBLIC HEARINGS/NOTICES ●●

Public hearings/notices are an integral component of water quality decision making, particularly:

- administrative rulemaking,
- water classifications and standards,
- permitting,
- environmental review, and
- administrative actions and penalties.

## **Administrative Rulemaking**

If the Board of Environmental Review proposes to modify, revoke, or make a new water quality rule, it must first hold a hearing to gather public comment. This requirement also applies to the adoption of any rule that is more **stringent** than federal guidelines (MCA § 75-5-203(2)-(3) and 307(1)-(2)).

## **Classifications and Standards**

In particular, when the Board creates or modifies water classifications or standards, a public hearing must convene, giving all **interested persons** opportunity to submit data or arguments (MCA § 75-5-307(1)). It is during this time that the public may present evidence of water misclassification, thereby starting the reclassification process.

Before such a hearing, the Board must post a notice -- specifying the waters concerned -- in a daily newspaper of general circulation in the area affected, mailing additional notices directly to all persons potentially affected by the proposed action (MCA § 75-5-307(1)-(2)).

## **Permitting**

Before the review of a permit application, Board rules require public notice of the upcoming review. The Department of Environmental Quality (DEQ) must hold a hearing whenever it finds a significant degree of public interest in a permit decision. Also, any **interested person** may request a public hearing on a pending permit review (MCA § 75-5-403(1)-(2)).

## **Environmental Review**

Furthermore, a decision to: (1) classify/reclassify waters or (2) grant a permit may trigger implementation of the **Montana Environmental Policy Act** (MEPA). This act requires some form of environmental review (e.g., an EIS or **Environmental Assessment** (EA)) before decision making occurs. All environmental reviews under MEPA stipulate public involvement (MCA § 75-1-201(1)-(2)). The Board has the option of combining the environmental review process with the public hearing process.

## **Administrative Actions and Penalties**

All Board hearings concerning DEQ actions or penalties against a violator must be public and held in the county where the alleged violation occurred.



## ●● CITIZEN SUITS ●●

In specific instances, citizens may choose litigation to promote water quality. Often, such cases are a method of recourse, limited to *interested persons* directly impacted by a regulation or action. Other times, any citizen may sue, compelling government to enforce a law.

### Recourse

In Montana, a person may sue to recover damages for contamination, diminution, or interruption of a water supply resulting from:

- the operation of a power/energy conversion facility, or
- mining exploration/operation (MCA § 75-20-405 and 82-4-355(1)).

### Enforcement

The federal **Clean Water Act** (CWA) allows citizens to sue the federal government to compel enforcement of the act, including specific federal water quality standards (33 U.S.C. 1319). No corresponding citizen suit provision exists in the state **Water Quality Act** (WQA).

## ●● CITIZEN OVERSIGHT ●●

Any person may notify the DEQ of an alleged water quality violation. Based upon submitted information, the Department will investigate the validity of the complaint. If a violation is determined, enforcement action will result. However, if the investigation proves the protest lacking in reasonable cause, the DEQ may recover investigative costs from the notifying party (MCA § 75-5-636).

## HOW CAN COMMUNITIES PARTICIPATE IN WATER QUALITY PROTECTION?

## ●● LOCAL WATER QUALITY DISTRICTS ●●

To provide further water quality protection at the county (or city-county) level, Montana law provides for local water quality districts to manage community waters (MCA § 7-13-4501).

**Initiation.** A board of county commissioners (or governing body of a city-county) may initiate the creation of a local water quality district by: (1) holding at least one public meeting, (2) passing a resolution of intention, and (3) allowing opportunity for protests (MCA § 7-13-4504).

**Planning and Information Gathering.** Once a county (or city-county) establishes a district, it consults with the DEQ to undertake planning and information-gathering activities for implementing a local water quality program (MCA § 75-5-311(1)).

**Program Implementation.** Next, a county (or city-county) takes its program plan before the Board of Environmental Review for approval (MCA § 75-5-311(2)). In approving a local water quality program, the Board: (1) determines that the program is consistent with the WQA and (2) evaluates the administrative organization, staff, and financial resources available to carry out the program.

After program approval, the district may adopt local water quality **ordinances** that: (1) are consistent with state law and (2) gain Board validation. Ordinances may regulate such items as:

- MPDES permitting,
- on-site wastewater disposal facilities,
- storm water runoff from paved surfaces, and
- service connections between buildings and publicly owned sewer mains (MCA § 75-5-311(2) and (4)(a)-(e)).

**Monitoring.** The DEQ monitors these local programs to ensure consistency with the WQA and Department policies, reporting all inconsistencies to the Board for further action.

## ●● WELLHEAD PROTECTION ●●

Montana -- with Environmental Protection Agency (EPA) approval -- has developed the **Montana Wellhead Protection Program** (WHPP) to help public ground water systems protect their supplies from contamination (MCA § 75-6-213). Participation in the WHPP begins upon the expressed interest of local government, water system operators, or citizen groups wanting to safeguard community waters.

The WHPP provides technical support and education to the interested community parties, and potentially culminates in the DEQ certification of a **Wellhead Protection Area**. Certification involves:

- delineation of the area to be protected,
- inventory of potential contaminant sources,



- development of local management strategies, and
- locating future replacement well sites.

Ultimately, the state intends the WHPP to be a community effort, “do-able” by local people with limited resources.

## ●● WATERSHED PROTECTION ●●

Despite its common aims, **watershed** protection varies in form from one community to the next. It may be informal and flexible, involving only a handful of people, or formal and structured, with thousands of participants. Most frequently, the process consists of a diversity of citizens converging in response to identifiable water quality issues. Common components of community action are:

- watershed identification and mapping,
- development of local management strategies,
- stream monitoring, and
- educational workshops and classes.

Local **conservation districts** often serve as the catalyst in organizing watershed planning efforts, assuring that all interested parties have an opportunity to play an active role. The Montana Watercourse also provides citizens information on watershed management decision making. Nationally, both the EPA and the Conservation Technology Information Center (CTIC) guide planning and network watershed groups.

# RELATED LAWS

## HOW DOES THE MONTANA WATER QUALITY ACT INTERRELATE WITH OTHER LAWS?

### ●● FEDERAL LAW ●●

#### **Clean Water Act** (33 U.S.C. 1251 et seq.)

To ensure national uniformity in water quality standards, Congress passed the **Clean Water Act (CWA)** in 1972. This federal law -- administered by the U.S. Environmental Protection Agency (EPA) -- overarches all state water quality laws.

For the CWA to be effective and enforceable at the state level, the EPA delegated primary implementation of many CWA programs to the state (1974, Cooperative Enforcement Agreement Between U.S. EPA and DEQ). Montana -- under EPA supervision -- achieves this state-level administration through the:

- Water Quality Act (WQA),
- Department of Environmental Quality (DEQ), and
- Board of Environmental Review.

In its oversight role, the EPA provides technical support, training, interpretation of federal regulations, and related assistance to Montana. Ultimately, the EPA retains final authority to implement or enforce any aspect of the CWA on a case-by-case basis, if needed.

### ●● MONTANA LAWS ●●

#### **Local Boards of Health** (MCA § 50-2-101 et seq.)

Each Montana community has a local board of health. Depending on population size, the board may be at the city, county, city-county, or district level. A central duty of a local board of health is ensuring its community a sanitary drinking water supply. Local boards safeguard public health by monitoring:

- communicable diseases,
- waste disposal,
- sewage treatment systems, and
- other sources of possible domestic water contamination.

Local boards may also regulate local water quality by adopting rules, standards, and fees consistent with state laws. *(Note: Because the authority of local boards is currently under analysis by the Montana courts, the function of these entities is subject to change).*

**Montana Environmental Policy Act**  
(MCA § 75-10-101 et seq.)

State policy endeavors to provide citizens the widest possible range of beneficial uses of the environment without degradation. Thus, a key policy component is the **Environmental Impact Statement (EIS)** -- a prerequisite for ***any proposed action*** that may significantly affect the environment. An EIS assesses any major economic, social, and environmental repercussions (including water quality) potentially occurring in areas impacted by the proposal.

**Public Water Supply Act**  
(MCA § 75-6-101 et seq.)

The Board of Environmental Review holds general supervision over all public water supply systems in the state. Among its duties, the Board:

- establishes maximum contaminant levels for domestic waters;
- monitors levels for compliance; and
- administers penalties for violations.

For its part, the DEQ:

- advises municipalities on proper construction/operation of water treatment and disposal facilities;
- investigates alleged pollution of public water supplies; and
- orders corrective actions.

In addition, public water systems experiencing financial hardship may apply for grants and/or loans through the DEQ to improve local water quality.

**Waste and Litter Control Laws**  
(MCA § 75-10-101 et seq.)

Local governments retain primary responsibility for managing solid waste. However, the DEQ advises and licenses local waste management systems. Municipalities must demonstrate that the location/operation of a waste disposal site does not endanger drinking water supplies. Operators of larger sites must also conduct routine monitoring of adjacent ground water for water quality compliance.

## **Underground Storage Tanks Laws**

(MCA § 75-11-201 et seq.)

Because leaking underground storage tanks are potential sources of significant water contamination, the state requires permits before the installation or closure of certain storage tank systems. Owners or operators of such systems must specify:

- installation/closure date,
- underground location, and
- tank contents.

The DEQ administers the storage tank permit process, conducting inspections to ensure compliance.

## **Major Facility Siting Act**

(MCA § 75-20-101 et seq.)

Construction of power facilities must be done with a minimal amount of environmental impact. Consequently, all proposed major facility sites must obtain a **Certificate of Environmental Compatibility and Public Need** from the Board of Environmental Review.

As part of the certificate, a site must demonstrate that facility construction/operation will not adversely impact water quality. The Board monitors all certified facilities for continued compliance.

## **Local Regulations of Subdivisions**

(MCA § 76-3-101 et seq.)

The state requires subdivisions to provide residents an adequate quantity and quality of water. All proposed subdivisions must file an **Environmental Assessment** (EA) with the county commission or local governing body. The EA must include:

- a description of every body/stream of surface water potentially affected by the proposed subdivision; and
- a Community Impact Report of anticipated water and sewage needs.

A subdivider must also furnish evidence that no excessive spending of public funds is necessary for the provision of such water services.

## **Sanitation in Subdivisions Act**

(MCA § 76-4-101 et seq.)

Once a subdivision receives approval from a local governing body, it is subject to state laws controlling municipal water supply and **potability**. The DEQ establishes subdivision standards for water quality, sewage treatment, and waste disposal. Boards of health then administer the standards locally.

## **Streamside Management Zone Law**

(MCA § 77-5-301 et seq.)

A **streamside management zone** is crucial to water quality. To safeguard such zones, the Department of Natural Resources and Conservation (DNRC) regulates timber harvests in these areas, expressly prohibiting activities such as:

- operation of wheeled vehicles,
- disposal of hazardous/toxic materials,
- burning, and
- **slash** deposits.

Persons found responsible for causing damage to these zones must undertake site rehabilitation and may be assessed a penalty.

## **Agricultural Chemical Ground Water Protection Act**

(MCA § 80-15-101 et seq.)

The DEQ advocates the prevention/minimization of ground water degradation from agricultural chemicals. Under EPA guidelines, the Department establishes and enforces numerical standards for such chemicals.

In partnership, the Department of Agriculture -- through public education programs and on-site monitoring -- promotes and administers **best management practices/plans** (bmps) and other alternative agricultural methods.

## **Strip and Underground Mine Siting Act**

(MCA § 82-4-101 et seq.)

All proposed **strip mining** and **underground mining** sites are subject to DEQ approval. The Department examines both site location and reclamation plans before granting the operator a permit to explore or mine. The project must pose minimal danger to the quality of impacted water, providing adequate remedies for any degradation to natural resources.

## **Metal Mine Reclamation Act**

(MCA § 82-4-301 et seq.)

Mineral exploration disturbs the surface/subsurface of the earth and produces waste materials. Thus, proper reclamation is necessary to maintain water quality in regions of metal extraction.

Before conducting *mine exploration*, a person must obtain an **Exploration License** from the DEQ, which mandates reclamation of all environmentally damaged areas (including adjacent waters).

To engage in *actual mining*, -- if the mined area: (1) comprises five or more acres or (2) uses cyanide processes -- a person must obtain an **Operating Permit** from the DEQ. Permit applicants must provide details of:

- the design, operation, and monitoring of the mine;
- the expected life of all tailings and waste byproducts; and
- remedial action plans for the control and mitigation of discharges to surface and ground water.

The Department inspects all operating permits at least annually to ensure compliance.

## **Water Use Act**

(MCA § 85-2-101 et seq.)

The DNRC stipulates that diversions and other water uses may pose ***no adverse threat*** to water quality, quantity, and established beneficial uses. Owners must plug/cap any contaminated wells endangering the quality of adjacent waters. The DNRC holds the right to investigate and monitor water use sites to determine compliance.

## CONCLUSION

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Upon examination of water quality regulation in Montana, one gains a better grasp of the interdependency of federal, state, tribal, and community laws in preserving and protecting state waters. Most importantly revealed, however, is the vital role of the informed, involved citizen -- the true impetus behind preserving, protecting, and maintaining Montana's water quality.



# GLOSSARY OF TERMS

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**abate** -- to reduce, lessen, or end.

**Administrative Rules of Montana (ARM)** -- a collection of state agency rules used in the implementation of federal and state codes.

**adverse** -- unfavorable.

**appeal** -- to transfer a case from a lower to a higher court for a new hearing.

**beneficial use** -- public use of water, including but not limited to agricultural, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, water leasing, and recreation.

**best management practices (BMPs)** -- practices to prevent/remedy the introduction of agricultural chemicals into ground water to the extent technically and economically practicable.

**bioaccumulate** -- to retain or continue building up a substance; to persist in the environment, transferring from one organism to the next along the food chain.

**brackish** -- salty and distasteful.

**city-county** -- a city and county consolidated into one governmental unit.

**compliance** -- obeying and achieving the conditions of a rule, permit, order, or law.

**conservation district** -- a political subdivision of state government, possessing both public and private attributes, that primarily distributes irrigation water in a given region, and may also administer electric power generation, water supply, drainage, or flood control.

**constitution** -- the highest form of state law, agreed upon by the people of the state, establishing the fundamental character and conception of state government.

**degradation** -- a lowering of water quality.

**diminution** -- a decrease in quantity.

**domestic use** -- a public or human use.

**effluent** -- an outflow or discharge of waste.

**Environmental Assessment (EA)** -- a document required by federal and state law that discloses likely *minor* environmental impacts of a proposed use.



**exemption** -- freedom from a rule or obligation that applies to others.

**ground water** -- any water beneath the land surface, bed of a stream, lake, or reservoir.

**high quality waters** -- all state waters except: (1) ground water classified as "III" or "IV," or (2) (a) surface waters incapable of supporting the designated uses of their classification, or (b) consistently having a zero flow for more than 270 days/year.

**impacted** -- diminished in quality.

**injunction** -- a court order prohibiting a specific act or commanding the undoing of some wrong or injury.

**interested persons** -- persons with a real property interest, water right, or other economic interest that may be directly affected.

**local water quality district** -- a defined community area established for protecting water quality.

**mitigate** -- to alleviate or improve upon the conditions of the violation.

**mixing zones** -- established areas where water quality standards may be exceeded while a discharge is mixed with receiving water.

**Montana Codes Annotated (MCA)** -- a collection of Montana laws and regulations classified by subject.

**municipal** -- relating to a local political unit (e.g., city or town) having self-governing powers.

**nonpoint source pollution** -- pollution from various indefinable points (versus one specific location) discharged over a wide area.

**nonsignificant** -- minimal; low potential for harm to human health or the environment.

**ordinance** -- a local law governing municipal matters not covered by state or federal law.

**outstanding resource waters (ORW)** -- waters located wholly within the boundaries of areas designated as national parks or national wilderness areas, or other waters approved by the legislature.

**oversight** -- watchful care, management, or supervision.

**parameter** -- a specific characteristic, boundary, or limit.

**parts per million (ppm)** -- the number of "parts" of a substance (by weight) per million parts of water.

**permit** -- an authorization from the DEQ that specifies all limitations imposed on volume, concentration, and other significant characteristics of a discharged waste.

**petition** -- a formal, written request to a government body to take action on a specific matter under its jurisdiction.

**point source pollution** -- pollution discharged from any identifiable point, including pipes, ditches, channels, sewers, and tunnels.

**Pollutant Discharge Elimination System (MPDES)** -- a system developed by the state for issuing permits for point source pollution discharge into surface waters.

**pollution** -- contamination or other alteration of the physical, chemical, or biological properties of state waters that exceeds that permitted by Montana water quality standards.

**potability** -- suitability for human consumption.

**quasi-judicial** -- a term applied to public administrative officers or bodies who exercise discretion of a judicial nature (e.g., investigations, hearings, and conclusions).

**recourse** -- the right to recover a loss or liability.

**remand** -- to send back to a lower court with instructions for further proceedings.

**remediate** -- to provide a remedy or correct a deficiency or wrong.

**sanitary** -- relating to public health and cleanliness; free from waterborne disease or waste.

**slash** -- branches and other residue left after the cutting of timber.

**solid waste** -- all rotting and nonrotting waste created by human activity (e.g., garbage, ashes, sewage sludge, construction byproducts, discarded home appliances, and wood debris).

**specific conductance** -- the amount of dissolved solids in the water; the higher the total dissolved solids, the higher the specific conductance.

**statutes** -- formal, legislatively created laws.

**streamside management zone** -- stream, lake, or other body of water and its adjacent area (at least 50 feet on each side) where habitat and water quality are easily affected by timber management practices.

**stringent** -- strict, severe.

**strip mining** -- removing the upper surface of the earth to recover mineral deposits.

**surface water** -- water above the land surface, including lakes, rivers, streams, wetlands, wastewater, flood water, and ponds.

**turbidity** -- cloudiness caused by suspended particles in water.

**typhoid** -- an infectious disease acquired by ingesting contaminated food or water, characterized by fever and intestinal disorders.

**underground mining** -- recovering a mineral deposit through an incline or shaft that penetrates the upper surface of the earth.

**water quality** -- chemical, physical, and biological characteristics of water that determine its suitability for a particular use.

**watershed** -- a geographic area that includes all land and water in a drainage system; size can range from as small as a backyard stream to as large as the Mississippi River.

**wellhead** -- the principal source of a ground water supply.

# INFORMATION RESOURCES

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## Federal

- ❖ **Conservation Technology Information Center (CTIC)**  
1220 Potter Dr., Room 170, West Lafayette, IN 47906-1383  
Ph: 317/494-9555, F: 317/494-5969, E-mail: [ctic@ctic.purdue.edu](mailto:ctic@ctic.purdue.edu)  
<http://www.ctic.purdue.edu>
- ❖ **Environmental Protection Agency (EPA)**  
301 S. Park, Drawer 10096, Helena, MT 59626  
Ph: 406/441-1123, F: 406/441-1125  
<http://www.epa.gov>

## State

- ❖ **Department of Agriculture**  
P.O. Box 200201, Helena, MT 59620-0201  
Ph: 406/444-2944, F: 406/444-5409, E-mail: [agr@mt.gov](mailto:agr@mt.gov)
- ❖ **Department of Environmental Quality (DEQ)**  
P.O. Box 200901, Helena, MT 59620-0901  
Ph: 406/444-2544, F: 406/444-4386, E-mail: [msimonich@mt.gov](mailto:msimonich@mt.gov)  
<http://deq.mt.gov>
- ❖ **Department of Natural Resources and Conservation (DNRC)**  
P.O. Box 201601, Helena, MT 59620  
Ph: 406/444-2074, F: 406/444-2684
- ❖ **Legislative Environmental Policy Office (LEPO)**  
Environmental Quality Council  
P.O. Box 201704, Helena, MT 59620-1704  
Ph: 406/444-3742, F: 406/444-3971, E-mail: [teverts@mt.gov](mailto:teverts@mt.gov)
- ❖ **Montana Watercourse**  
201 Culbertson Hall, Montana State University, Bozeman, MT 59717  
Ph: 406/994-6671, F: 406/994-1919, E-mail: [jetgen@montana.campus.mci.net](mailto:jetgen@montana.campus.mci.net)
- ❖ **Montana State Law Library**  
Justice/State Library Bldg., P.O. Box 203004, Helena MT 59620-3004  
Ph: 406/444-3660, F: 406/444-3603, E-mail: [jmeadows@mt.gov](mailto:jmeadows@mt.gov)  
<http://161.7.121.6>
- ❖ **Montana State Library**  
Natural Resource Information System  
Justice/State Library Bldg., P.O. Box 201800, Helena, MT 59620-1800  
Ph: 406/444-5354, F: 406/444-0581, E-mail: [jstimson@nris.mt.gov](mailto:jstimson@nris.mt.gov)  
<http://nris.mt.gov>
- ❖ **Montana university system Water Center**  
101 Huffman Bldg., Montana State University, Bozeman, MT 59717  
Ph: 406/994-6690, F: 406/994-1774, E-mail: [wwwrc@gemini.oscs.montana.edu](mailto:wwwrc@gemini.oscs.montana.edu)  
<http://www.montana.edu/wwwrc>



1000 copies of this public document were published at an estimated cost of \$1.75 per copy, for a total cost of \$1750.00, which includes \$1750.00 for printing and \$.00 for distribution.